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March 26, 1999



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Re: Granville Solvents Site

Dear Mike:

When we last spoke, I mentioned that we had just about completed our analysis of whether RCRA requirements are applicable or appropriate to the removal action being conducted at the Granville Solvents Site. Enclosed you will find our analysis. I trust that you will find it informative and persuasive. It provides a comprehensive analysis of the unique situation at Granville, and forms the basis for the conclusion that RCRA is neither appropriate nor relevant as a closure or corrective action standard. I will not reiterate the arguments here, the position paper is self-explanatory.

Because the Administrative Order requires the soil action to meet ARARs, the Granville Solvents Site PRP Group respectfully requests that EPA make a determination that RCRA is not an ARAR in this specific instance. Alternatively, the PRP Group requests that EPA make a determination that the action and cleanup standards as proposed satisfy RCRA ARAR requirements and, we are certainly willing to discuss this issue in further detail with EPA. Nevertheless, a finding by EPA that the selected alternative, remedial standards, and confirmation points set forth in the EE/CA, the Risk Assessment, and the Groundwater Fate and Transport Model either are not subject to RCRA ARARs, or meet the same is necessary.



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As always we appreciate your cooperation in this matter. We look forward to resolution of this issue so that we may move forward to the public comment or hearing process and eventual implementation of the final element of the removal action.

Sincerely yours,

Ben L. Pfefferle III

BLP:cjc Enc.

cc: Steering Committee, w/enc.

Technical Committee, w/enc.

158246 3/25/99

RCR4 REQUIREMENTS ARE NEITHER APPLICABLE NOR APPROPRIATE FOR THE GRANVILLE SOLVENTS SITE

CERCLA requires that remedial actions comply with federal and state environmental laws that are legally "applicable" or "relevant and appropriate" under the circumstances of the release. CERCLA § 121(d). For the reasons discussed below, we do not believe that the RCRA closure and corrective action requirements (the "RCRA Requirements") are applicable or appropriate for the Granville Solvents Superfund Site (the "Site").

1. The RCRA Requirements Are Not Applicable Because a Jurisdictional Prerequisite of RCRA is Not Met

- Applicable requirements are cleanup standards, standards of control, or other substantive requirements promulgated under federal or state law that "specifically address a hazardous substance, pollutant, contaminant, remedial action, location, or other circumstance at a CERCLA site." 40 C.F.R. § 300.5.
- The RCRA Requirements are applicable only if they would apply independently of the CERCLA authority. U.S. EPA, <u>Overview of ARARs -- Focus on ARAR Waivers</u> ("<u>ARAR Waivers</u>"), 9234.2-03/FS at 2 (Dec. 1989); U.S. EPA, <u>CERCLA C ompliance With Other Laws Manual</u> ("<u>Manual</u>"), EPA/540/G-89/006 at 1-60 (Aug. 1988).
- For a requirement to be applicable, all jurisdictional prerequisites of the requirement must be met, including that the party conducting the CERCLA cleanup is subject to the law. ARAR Waivers at 2; Manual at 1-60 (jurisdictional prerequisites include "[w]ho, as specified by the statute or regulation, is subject to its authority").
- In our case, the RCRA Requirements do not apply to the Granville PRP Group (the "PRP Group") as a matter of law because it is not the owner or operator of the TSD facility. Thus, a jurisdictional prerequisite of RCRA is not met. The mere fact that hazardous waste was disposed of after the effective date of RCRA does not automatically render the RCRA Requirements applicable. Rather, this is a threshold inquiry to determine if RCRA is potentially applicable. Even if hazardous waste was disposed of after the effective date, RCRA is only applicable to parties subject to its authority.

- The part 264 requirements apply (a) opposed to being potentially relevant and appropriate) only to permitted facilities. See 40 C.F.R. § 270 1(a)(3) (the regulations contained in part 264 are used by permit issuing authorities to determine what requirements must be placed "in permits if they are issued"); Manual at 1-83 (the part 264 regulations apply to permitted facilities). The Site had interim status only and, therefore, the owners and operators of the TSD units at the Site would have been subject to part 265 requirements, not part 264. As discussed herein, the part 265 requirements also are not applicable because a jurisdictional prerequisite is not satisfied.
- The OEPA's previous attempt and failure to address contamination at the Site under its RCRA authority is telling. It could not do so because the closure and corrective action requirements apply only to the former owners and operators of the TSD units at the Site, not the PRP Group or its individual members. The fact that the PRP Group may be required by the U.S. EPA to clean up the Site under the broad liability provisions of CERCLA does not mean that such parties are subject to the RCRA requirements applicable only to the former owners and operators.
- The PRP Group is not the owner of the Site.
- The PRP Group is not the operator of the Site.
 - Under RCRA, "operator" means the person responsible for the overall operation of the facility. 40 C.F.R. § 260.10.
 - Courts have consistently held that the term operator under RCRA requires some degree of participation in the management of the facility or authority to make decisions regarding the handling or disposal of hazardous waste. <u>Letter From Marcia Williams (USEPA) to Richard Uhlar</u> at 2 (Oct. 28, 1987); <u>See also Lincoln Properties</u>, <u>Ltd. v. Higgins</u>, No. S-91-760 DFL/GGH, 1993 U.S. Dist. Lexis 1251 at *90-92 (E.D. Cal. Jan. 21, 1993) (Courts have generally imposed operator liability only on those who are actively involved in a facility's operation.)
 - Courts have construed operator liability under CERCLA similarly. In order to be an operator under CERCLA, a party must exercise some kind of day-to-day control over the operations at the site or the activity that produces the contamination. See, e.g., Interstate Power Co. v. Kansas City Power & Light Co., 909 F. Supp. 1284, (N.D. Iowa 1994) (contractor was not an operator under CERCLA where it did not do anything that it was not ordered to do by its employer and that it was given the approval to do by the Iowa Department of Natural Resources); Grand Trunk Western Railroad Co. v. Acme Belt Recoating, Inc., 859 F. Supp. 1125, 1131 (W.D. Mich. 1994) (easement

holder was not liable under CERCLA because it had no control over the internal decisions regarding waste disposal and storage and had no hands on involvement contributing to the release.)

- If a party is acting only to clean up a hazardous waste site, this activity does not raise its status to that of an operator. Cf. Stilloe v. Almy Bros., Inc., 782 F. Supp. 731, 736 (N.D.N.Y. 1992) (New York Department of Environmental Conservation was not an operator under CERCLA when it had no nexus to the site other than by reason of its remedial activities); Cf. United States v. Berks Assoc., No. 91-4868, 1992 U.S. Dist. Lexis 4978 at *10 (E.D. Pa. Apr. 1, 1992) (to consider the remedial actions taken by the USEPA equivalent to those of an operator would push CERCLA beyond its proper bounds). The PRP Group is conducting strictly remedial activities at the Site pursuant to the Consent Order and cannot commence or undertake any removal actions at the Site without prior EPA approval. Consent Order section 2.1. To find that it is subject to the RCRA Requirements simply by virtue of entering into and complying with this Consent Order would be unjust and contrary to public policy.
- The structure of RCRA with its permit process suggests that it attempts to regulate currently operating hazardous waste facilities to prevent the need for corrective action. Such prevention can only be accomplished by the owner or operator of an ongoing waste management operation. See, e.g., Acme Printing Ink Co. v. Menard, Inc., 870 F. Supp. 1465, 1477 (E.D. Wis. 1994) (purchaser of property used by former owner as a landfill was not liable under RCRA because it was not currently operating a hazardous waste facility). The PRP Group had no control over the handling of waste when it was disposed of at the Site and, unlike Granville Solvents, Inc., had no ability to prevent the contamination at the Site. To impose the RCRA Requirements on the PRP Group irrespective of this fact would extend the applicability of RCRA beyond the bounds intended by Congress.
- The RCRA provisions must be examined in light of the statutory scheme Congress enacted through CERCLA. Congress established a broad liability scheme under CERCLA that imposes liability on parties who arranged for the disposal of hazardous substances at a site. Congress did not impose liability under RCRA on such parties. Under RCRA, liability is imposed on the owner or operator of facilities that treat, store or dispose of hazardous waste. It would be improper and unfair to impose RCRA liability on the PRP Group who are involved at the Site only because of CERCLA liability. Thus, the RCRA Requirements are not applicable requirements in this case.

II. The RCRA Requirements Are Not Appropriate

A. Background

- Relevant and appropriate requirements are those which, though not applicable, "address problems or situations sufficiently similar to those encountered at the CERCLA site that their use is well suited to the particular site." 40 C.F.R. § 300.5.
- The determination of whether a requirement is relevant and appropriate is "site-specific and is based on best professional judgment, taking into account the circumstances of the release or threatened release." ARAR Waivers at 2.
- The U.S. EPA provided a list of factors to be considered when determining relevance and appropriateness. See generally 40 C.F.R. § 300.400(g). The listed factors that seem most relevant in our case include the actions or activities regulated by the RCRA requirements and the remedial action contemplated at the CERCLA site; the type and structure or facility regulated by the RCRA requirement and the type and size of structure or facility affected by the release or contemplated by the CERCLA action; and the different purpose of the RCRA requirements compared to the purpose of the CERCLA action.
- B. The RCRA requirements were intended for discrete units, not for wide-spread, dispersed contamination or large scale, site-wide remediation. Manual at 2-21.
 - RCRA closure is based in part on the assumptions that there exists a discrete unit or some other barrier to hazardous waste releases and migration and that there is some form of early leak detection and, therefore, limited contamination. See 47 Fed. Reg. 32,274, 32,321 (1982) (Standards Applicate to Owners and Operators of TSD Facilities Interim Final Rule Preamble); Manual at 1-68 (the RCRA requirements are designed to apply to specific types of discrete units). These assumptions do not hold true at the Site.
 - The subpart F procedures for monitoring and (in the case of the part 264 requirements) corrective action of contaminated groundwater are designed to address a plume of groundwater from a distinct source. They are a mismatch when superimposed upon CERCLA sites with area-wide groundwater contamination from unknown or multiple sources.
 - "[T]he groundwater monitoring requirements designed for regulated

units do not provide sufficient flexibility for complex cleanups." 63 Fed. Reg. 56,725 (Post-Closure Rule Preamble) (Oct. 22, 1998).

- The subpart F requirements hold the owner/operator responsible for hazardous substances that migrate beyond the unit's boundaries. Such contamination must be cleaned to specified limits at the unit boundary. This is because the subpart F procedures are implemented on a unit-by-unit basis. It is assumed that contamination from one unit is distinguishable from contamination from other units.
- The Site involves area-wide groundwater contamination from multiple sources. The subpart F and closure requirements concerning point of compliance is ill-suited to this circumstance.
- There were several potential sources of contamination at the Site, including aboveground and underground storage tanks, releases from operations inside and outside of the warehouse building, drum storage areas, distillation building, and other unknown areas on the Site.
- The contaminants present in the soil are widely dispersed and may have intermixed from a number of sources that are known or not known at the Site.
 Based on our analysis of the data, we are unable to identify discrete or separate sources of these contaminants.
- The contaminants are widely distributed in groundwater and have migrated well beyond the boundary of the Site nearly to the municipal well field. Mixing of the contaminants in the groundwater system further obfuscates any discrete source (or sources) that may have existed.
- It is not possible (and should not be necessary) in most cases to distinguish the specific source of contaminants in soil and groundwater at the Site. For example, clean closure of the USTs removed by the U.S. EPA would require removal of soils with contaminants that may have resulted from other activities. It would be impossible to delineate the line where contaminants from the USTs end and from other sources begin.
- The agency should take a holistic view of the Site rather than attempting to discern and address discrete units. If not, CERCLA's objective for a cost-effective response will not be achieved. See CERCLA § 121(a).

- C. The specific objectives of the RCRA Requirements are much different than the specific objectives of the CERCLA action at the Site.
 - RCRA was intended to control the generation, transport and disposal of
 hazardous wastes in the context of ongoing waste management operations so
 as to prevent the need for corrective action. CERCLA's mandate is to
 provide expeditious cleanup of wastes that already have been inadequately
 disposed or mismanaged.
 - Closure requirements specify the way a unit is decommissioned so as to avoid creating problems due to releases. The subpart F corrective action authorities for contaminated groundwater within a unit are largely preventative in nature. CERCLA addresses releases that have occurred.
 - "[W]here an old regulated unit has released hazardous constituents into the environment and releases from the unit are being addressed as part of a cleanup, EPA believes that Subpart F requirements do not make sense (since these requirements were designed primarily as preventative standards for units that had not yet had releases into the environment). . . ." 63 Fed. Reg. 65,905 (HWIR Rule Preamble) (Nov. 30, 1998).
 - The closure requirements are designed, among other things, to be extremely stringent and, therefore, create an incentive for proper management of hazardous wastes so that the unit will be largely intact at the end of their operating life. This incentive has no effect at the Site.
 - Clean closure results in the release of the owner or operator from all further responsibility. Therefore, the standards are very conservative to guarantee that the levels of contamination left behind will be so minimal that there will no way for harm in an indefinite period of time. In contrast, the agency has continuing authority with respect to the CERCLA action.
- D. Strict compliance with clean closure standards or corrective action requirements is not necessary to protect human health and the environment in this case.
 - The substantial impact of finding the RCRA closure and corrective action requirements appropriate is that the point of compliance may be unnecessarily shortened, thus requiring the treatment or removal of significantly larger amounts of soil that may affect groundwater and operating the groundwater extraction and treatment system for a much longer period, which would significantly increase response costs, even though such additional actions cannot be justified on the basis of risk to receptors.

- The proposed cleanup will be fully protective of human and environmental receptors and will ensure that water that enters the Village of Granville drinking water supply will meet all risk-based and all applicable drinking water standards, as required by the consent order.
- To comply with potential RCRA compliance points (if it is technically practicable to do so) would increase the cost of remediation by two or more times.
- Moreover, to comply with a RCRA compliance point and other RCRA requirements may not be practicable given the challenging nature of the geological and hydrogeological conditions at the Site. There are few currently available technologies that have demonstrated reliability for removing the subject contaminants from this type of soil. Those technologies are challenged by the physical site conditions and do not appear to be technically practicable.

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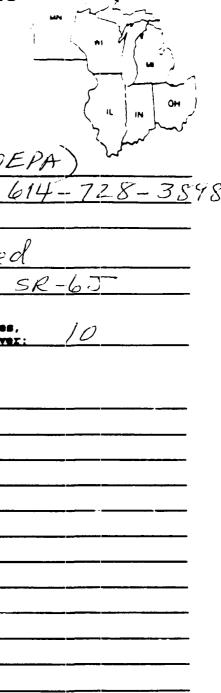
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